

WHAT AMERICAN LEGAL THEORY MIGHT LEARN FROM ISLAMIC LAW: SOME LESSONS ABOUT ‘THE RULE OF LAW’ FROM ‘SHARI‘A COURT’ PRACTICE IN INDIA

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In 2010, voters in the state of Oklahoma passed a constitutional amendment that prohibits the Oklahoma courts from considering “Sharia Law.” A great deal of the support for this amendment and similar (ongoing) legal initiatives appears to be generated by a deep-seated paranoia about Muslims and Islamic law that has taken root in many parts of the post-9/11 United States. This Article contends that the passage of this Oklahoma constitutional amendment should not have been surprising given that it is not only right-wing partisans who have felt the need to strictly demarcate and police the boundaries of the American legal system, but also liberal partisans too. Indeed, this Article argues that certain modes of American liberal legal thought actually facilitate the anti-shari‘a mania currently sweeping the United States. As a result, an adequate response to this mania cannot simply rely on traditional,

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American-style, liberal legal theorizing. Indeed, as this Article argues and explains, some extant American liberal understandings of ‘law,’ ‘legal systems,’ and ‘the rule of law’ are eminently inappropriate resources in the struggle against American forms of reactionary parochialism because these liberal understandings are themselves deeply compromised by their own forms of parochialism.

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INTRODUCTION

American legal culture, at least in some of its most dominant and most vocal articulations, views the United States as committed to ‘the rule of law.’ While no two people view the meaning of ‘the rule of law’ identically, many popular definitions of this indeterminate phrase coalesce around its relation to some combination of ‘clear rules,’ ‘fair rules,’ and ‘the same set of rules for everyone (rich/poor, black/white, straight/gay, etc.)’ In this latter aspect—the same set of rules applying to everyone—‘rule of law’ ideology has often been invoked to disparage legal pluralism. Raising slogans like ‘uniformity,’ ‘equality,’ and ‘predictability,’ American ‘rule of law’ partisans have tended to embrace a view of law—and legal institutions—that frowns upon difference, diversity, and context.¹ In the twenty-first century, American concern with

1. See, e.g., Editorial, *Triumph for Equality; Common Decency Wins Out in Votes on Gay Marriage*, WASH. POST, Apr. 8, 2009, at A16 (commending Vermont for coming to the conclusion that “[c]ommon decency and the protections guaranteed to all citizens by *the rule of law* demand that the relationships of gay men and lesbians be respected and recognized” (emphasis added)). Prior to the state legislative vote commended by this editorial, Vermont had recognized “civil unions” for same-sex couples, but not “marriage,” reserving this latter status for opposite-sex couples. *Id.* The position in this editorial is emblematic of the uses of ‘rule of law’ rhetoric and arguments to quash pluralistic arrangements vis-à-vis

‘the rule of law’ has both deepened and broadened, extending now to systems of private² religious law found within the United States.

While private Jewish legal authorities and private Jewish actors operating in the United States have previously experienced some degree of scrutiny, criticism, and regulation,³ this kind of suspicious treatment is now being extended with special fervor to Islamic legal authorities operating within the United States. American practitioners of Islamic law, for example, have recently had to confront a number of particularly aggressive state legislative and constitutional initiatives aimed at discouraging Islamic legal practices in particular.

For example, in 2010, voters in the state of Oklahoma passed an amendment to that state’s constitution insisting that:

[State of Oklahoma courts], when exercising their judicial authority, shall uphold and adhere to the law as provided in the United States Constitution, the Oklahoma Constitution, the United States Code, federal regulations promulgated pursuant thereto, established common law, the Oklahoma Statutes and rules promulgated pursuant thereto, and if necessary the law of another state of the United States *provided the law of the other state does not include Sharia Law*, in making judicial decisions. *The courts shall not look to the legal precepts of other nations or cultures. Specifically,*

relationship recognition. For more on the advantages of a legally-pluralistic approach to relationship recognition, see generally Jeffrey A. Redding, *Dignity, Legal Pluralism, and Same-Sex Marriage*, 75 BROOK. L. REV. 791 (2010).

2. I use the term ‘private’ here merely to make a temporary distinction between ‘public’ systems of law—which overtly depend on the state for their legislation and institutional enforcement—and ‘private’ systems of law—which neither overtly depend on the state for the legislation of their norms, nor directly rely on the state for the institutional infrastructure (e.g., arbitrators, mediators) whereby these norms are enforced. This all being the case, as I will discuss *infra*, there is no easy line to draw between the ‘public’ and the ‘private’ and my momentary use of these terms here is not meant to suggest otherwise.

3. See generally Patti A. Scott, Comment, *New York Divorce Law and the Religion Clauses: An Unconstitutional Exorcism of the Jewish Get Laws*, 6 SETON HALL CONST. L.J. 1117, 1132–46 (1996) (discussing New York State courts’ various enforcements of (ostensibly) neutral principles of law in ways that strongly ‘encourage’ Jewish husbands to religiously divorce their divorce-requesting (Jewish) wives even though these husbands may be acting within their religious rights to refuse divorce).

*the courts shall not consider international law or Sharia Law.*⁴

A great deal of the support for this amendment and similar (ongoing) legal initiatives appears to be generated by a deep-seated paranoia about Muslims and Islamic law that has taken root in many parts of the post-9/11 United States. Moreover, such support seems to be steeped in the view that—to quote the former candidate for the Republican Party presidential nomination, Rick Santorum—“[s]haria law is incompatible with American jurisprudence and [the] Constitution.”⁵ Presumably, such jurisprudence and constitutional wisdom is viewed as including a commitment to ‘the rule of law.’

As puzzling and surprising as this Oklahoma constitutional amendment has been to certain American liberal legal sensibilities, its passage should not have been surprising in light of similar legislative moves elsewhere in the ‘liberal West.’ For example, in 2007 in Canada, fears and worries over efforts by the Ontario-based Islamic Institute of Civil Justice (IICJ) to offer religion-premised family law arbitration services to Muslims resulted in Ontario legislatively declaring that it would no longer recognize any “[arbitration] process that is not conducted exclusively in accordance with the law of Ontario or of another Canadian jurisdiction.”⁶ Islamic law, in particular, was presumed—and intended—to fall outside of Canada’s legal boundaries.⁷ In the United Kingdom as well, the debate over the state’s recognition of non-state Islamic practices continues to this day after a controversial talk delivered by the Archbishop of Canterbury on this subject in 2008 suggesting that the British polity could, in some circumstances, tolerate the enforcement of Islamic law.⁸ Given the tone of this and

4. H.R.J. Res. 1056, 52nd Leg., 2d Reg. Sess. (Okla. 2010), available at <https://www.sos.ok.gov/documents/questions/755.pdf> (emphasis added).

5. See Kendra Marr, *Rick Santorum: Sharia 'Is Evil'*, POLITICO (Mar. 11, 2011, 11:16 PM), <http://www.politico.com/news/stories/0311/51166.html>.

6. See Arbitration Act, S.O. 1991, c. 17, s. 2.2 (1) (Can.), available at http://www.e-laws.gov.on.ca/html/statutes/english/elaws_statutes_91a17_e.htm#BK3 (last visited Feb. 11, 2012).

7. For more discussion of the Islam-centered focus of the Canadian legislative debates, see generally Jeffrey A. Redding, *Institutional v. Liberal Contexts for Contemporary Non-State, Muslim Civil Dispute Resolution Systems*, 6 J. ISLAMIC ST. PRAC. INT’L L. 1 (2010). See also Ayelet Shachar, *Privatizing Diversity: A Cautionary Tale from Religious Arbitration in Family Law*, 9 THEORETICAL INQUIRIES L. 573, 584 (2008).

8. See Redding, *supra* note 7, at 13–14. See generally John R. Bowen, *How Could English Courts Recognize Shariah?*, 7 ST. THOMAS L. REV. 411 (2010).

related debates, one has to be quite worried about the future prospects of legal pluralism in an increasingly conservative and reactionary British polity.

Moreover, the passage of this Oklahoma constitutional amendment should not have been surprising given that it has not only been partisans of an increasingly paranoid and crude nationalistic politics who have felt the need to strictly demarcate and police the boundaries of (liberal) legal systems, but also more ‘respectable’ voices too. Indeed, this Article contends that certain modes⁹ of American liberal legal thought have facilitated the anti-shari‘a mania currently sweeping the United States.¹⁰ As a result, an adequate response to this mania cannot simply rely on traditional, American-style liberal legal theorizing. In fact, as this Article argues, some of our extant liberal understandings of ‘law,’ ‘legal systems,’ and ‘the rule of law’ are eminently inappropriate resources in the struggle against reactionary parochialism because they themselves are deeply compromised by their own forms of parochialism.

In this vein, in the process of developing his notion of what is meant by a ‘legal system,’ Joseph Raz¹¹ has asserted, “all legal systems are open systems.”¹² However, he has also then gone on to describe ‘openness’ in the following manner: “A normative system is an open system to the extent that it contains norms the purpose of which is to give binding force within the system to norms which do not belong to it. *The more*

9. I say ‘certain modes’ here because, obviously, there is disagreement within any community—including the liberal community—about the meaning of community norms. In this respect, a prominent liberal lawyers organization recently filed an amicus brief in a federal lawsuit challenging the Oklahoma state constitutional amendment, *see supra* note 4 and accompanying text, arguing that “the Rule of Law . . . is violated by the ‘Save Our State Amendment’ to the Oklahoma Constitution.” Amicus Curiae Brief in Support of Plaintiff Appellee Submitted by the Association of the Bar of the City of New York and the Islamic Law Committee of the American Branch of the International Law Association at 1, *Awad v. Ziriax*, No. 10-6273 (10th Cir. 2011).

10. *See* text accompanying *infra* note 21.

11. I characterize Joseph Raz as belonging to an ‘American’ mode of legal philosophizing because of his long-standing affiliation with Columbia Law School in New York City, and also because Raz’s work is popular within the American legal academy. *See* Joseph Raz, *CV*, <https://sites.google.com/site/josephnraz/cv> (last visited Mar. 26, 2012). However, as is well known, Raz was born and educated in modern-day Israel and, in addition to having taught there, has also been a professor at Oxford University. *See* Martin Lyon Levine, *Foreword to* Symposium, *The Works of Joseph Raz*, 62 S. CAL. L. REV. 731, 736 (1989).

12. JOSEPH RAZ, *THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY* 120 (1979) (footnote omitted).

'alien' norms are 'adopted' by the system the more open it is."¹³ What one hand giveth, the other apparently taketh away: in proposing the possibility of systemic permeability, Raz has also allowed for systemic unintelligibility or, in other words, thorough systemic 'alien'ability.

Of course, no single theorist's work is single-handedly responsible for creating the eerie sympathies that exist between a certain liberal kind of legal philosophizing and a certain reactionary and nationalistic kind of legal politics that is increasingly prevalent in the liberal West, including the United States. And, in fact, some of the problems with Raz's older theorizing echo in more recent work by well-known liberal legal theorist, Jeremy Waldron,¹⁴ indicating that the problems associated with American (liberal) legal theorizing about 'the rule of law' run deep and wide. That being the case, this Article can only begin the project of identifying these problems, serving as the opening chapter of a much larger project of mine on "late liberalism"¹⁵ and its Islamophobic tendencies. This larger and longer project aside, the threat posed by Oklahoma's recent amendment of its state constitution is an immediate one. Not only does this amendment and other legal initiatives like it suffer from legal incoherence, these initiatives also contribute to a climate of quickening prejudice and intolerance. This Article then aims to forthrightly (if all-too-briefly) diagnose the surprising (e.g., liberal) roots of this intolerance and discuss the surprisingly ineffective antidote that American-style legal liberalism provides for it.

While the problems of American legal liberalism are manifold, this Article concentrates on this liberalism's nearsightedness. As the above mention of Joseph Raz's work suggests, American legal liberalism is compromised by a kind of parochialism which finds expression when American legal

13. *Id.* at 119 (emphasis added).

14. I characterize Jeremy Waldron as belonging to an 'American' mode of legal philosophizing because of his affiliations with both Columbia University and New York University, and also because Waldron's work is popular within the American legal academy. However, Waldron was born and educated in New Zealand and, like Joseph Raz, also spent significant time at Oxford University. See Background Information on Jeremy Waldron: University Professor & Professor of Law, N.Y.U. DEP'T OF PHIL., <http://philosophy.fas.nyu.edu/object/jeremywaldron.html> (last visited Mar. 26, 2012).

15. To borrow a phrase from anthropologist Elizabeth Povinelli. See generally ELIZABETH A. POVINELLI, *THE CUNNING OF RECOGNITION: INDIGENOUS ALTERITIES AND THE MAKING OF AUSTRALIAN MULTICULTURALISM* (2002).

liberalism demonstrates its too-ready willingness to draw national and cultural borders when thinking about ‘law,’ ‘legal systems,’ and ‘the rule of law.’ In addition, American legal liberalism is compromised by another kind of parochialism too, namely a disciplinary parochialism,¹⁶ which, among other things, evinces a profound lack of interest in the discipline of anthropology and its ethnographic methodologies. Both of these parochialisms work together to foreclose lessons about ‘law,’ ‘legal systems,’ and ‘the rule of law’ that can be gleaned not only from jurisdictions outside the borders of the United States, but also outside the official jurisdictional borders of *state/‘official’* courts.

This state of theoretical affairs is unfortunate. As a result, in the course of demonstrating some of the theoretical inadequacies of American liberal legalism, this Article also commences an alternative theorization about ‘law,’ ‘legal systems’ and, more particularly, ‘the rule of law.’ This theorization relies heavily on what can be learned about ‘the rule of law’—including whatever exists of it in the United States—from the experiences of an Indian Muslim woman, ‘Ayesha,’¹⁷ who recently used a non-state ‘shari‘a court’ (specifically, a ‘*dar ul qaza*’¹⁸) in Delhi to exercise her Indian Islamic divorce rights. I recently interviewed Ayesha at length as part of my larger project on liberalism and Islamophobia. From Ayesha’s recounting of the practices and procedures of the Delhi *dar ul qaza* from which she obtained a divorce from her husband in 2008, it is clear that there are interesting congruencies and discrepancies between this non-American, non-state legal venue’s crafting of its procedures and those state-premised legal procedures idealized by American legal theorists. More generally, Ayesha’s experience suggests that ‘the rule of law’ can exist (for better or worse) in both the public and private legal domains, and that both right-leaning Americans and their liberal American friends are mistaken

16. Raz manages to draw together both parochialisms in his well-known volume on law. See RAZ, *supra* note 12, at 104, 119. With respect to Raz’s disciplinary parochialism, while expounding on “the institutional nature of law,” Raz emphasizes his interest in approaching law from a philosophical, and not a socio-legal/anthropological approach. For Raz, the two methodological approaches are distinctly different: “This is the difference between legal philosophy and sociology of law. The latter is concerned with the contingent and with the particular, the former with the necessary and the universal.” *Id.* at 104.

17. Not her real name.

18. *Dar ul qaza* means ‘place of adjudication’ in both Urdu and Arabic.

when they ignore this distinct possibility—all the while articulating ostensibly ‘universal’ theories about ‘law,’ ‘legal systems,’ and ‘the rule of law.’ As this Article argues, American legal liberalism’s neglect of the non-state is particularly egregious given that this neglect paved the way for recent anti-shari’a legislative initiatives, such as that which was recently passed in Oklahoma.

Part I of this Article opens with a brief exposition of ‘rule of law’ ideology, focusing on recent claims about ‘the rule of law’ that have been made by prominent liberal legal theorist Jeremy Waldron. The discussion here focuses on two of Waldron’s recent contributions to this intellectual tradition, as these build upon, encapsulate, and also react against previous work done within this ideological vein. The aim of this Part is to highlight how state/‘official’ courts get prioritized in ‘the rule of law’ tradition, in the process marginalizing non-state—including, often enough, Islamic—legal institutions.

Part I’s discussion sets the stage for Part II’s troubling of liberal, state-oriented theorizations of law and legal institutions via a presentation of ethnographic evidence concerning an actual non-state Islamic legal venue. Part II thus shifts gears, from legal idealization to legal ethnography, introducing ‘Ayesha,’ an Indian Muslim woman in her early forties whom I got to know in the course of fieldwork that I conducted in India for eight months over the course of two years, from 2007–2009. Part II explains Ayesha’s experiences with a non-state shari’a court (or *dar ul qaza*) in Delhi from which she obtained a divorce decree. Part II will explain the practices and procedures of this non-state legal venue, as experienced and understood by a party who has had sustained personal interaction with it.¹⁹

Part III brings the previous two Parts into dialogue, exploring what Ayesha’s recounting of the operations of a non-state *dar ul qaza* system reveals about ‘the rule of law,’ both within and without the state and its legal institutions. As this Part discusses, Ayesha’s experience does not provide us with easy narratives about ‘law,’ ‘legal systems,’ or ‘the rule of law.’ While Ayesha’s story does illustrate that Waldron’s state-premised legal proceduralism *can* rule *outside* of the state’s

19. For more discussion concerning the reasons why I am using, in particular, Ayesha’s portrayal of the *dar ul qaza* to understand how such an institution operates, as well as discussion on some of the (unavoidable) problems and potentials accompanying this methodological ‘decision,’ see *infra* Part II.

courtrooms quite frequently and adequately, her story also reveals the ambivalent value of that ‘rule of law.’ Ultimately then, Ayesha’s experience with an Islamic legal institution holds many important lessons for liberal legal thought, in the United States and elsewhere.

Oklahoma’s amendment was the first American state initiative to label certain Islamic private law practices as “other.”²⁰ However, it has not been nor will it be the last such initiative; similar initiatives have been pursued in more than twenty other states²¹ and many more can be expected in the future. As unsophisticated as these anti-shari’a initiatives seem, they share a great deal with seemingly sophisticated American liberal legal theorizing. Both these initiatives and this theorizing espouse a universalistic commitment to ‘the rule of law,’ yet are also seemingly uncurious about the mechanics and procedures of actual law and actual legal systems, whether inside or outside of the United States. In what follows, I hope to demonstrate that there are better ways to think about ‘law,’ ‘legal systems,’ and ‘the rule of law,’ wherever and however they occur. In this respect, American liberal legal theorizing does not provide an antidote to American legal nationalism. Rather, along with their right-wing American friends, American liberal legal theorists have a tendency to marginalize Islamic legal practices. As this Article suggests, however, American liberal legal theorists could learn from the same Islamic practices which they presently ignore and marginalize.

20. See *supra* note 4 and accompanying text.

21. The following states, in addition to Oklahoma, either have considered or are considering changes to their statutes or constitutions, aimed at limiting the recognition or enforcement of Islamic law/shari’a within those states: Alaska, Alabama, Arizona, Arkansas, Florida, Georgia, Indiana, Iowa, Kansas, Louisiana, Maine, Mississippi, Missouri, Nebraska, New Mexico, North Carolina, South Carolina, South Dakota, Tennessee, Texas, West Virginia, and Wyoming. See Tim Murphy, *Map of the Day: The Anti-Sharia Panic*, MOTHERJONES (Aug. 26, 2011, 6:48 AM), <http://motherjones.com/mojo/2011/08/anti-sharia-panic-how-lie-becomes-bill>. Arizona’s proposed bill is perhaps the most radical and bizarre of all of these, aimed as it is at something it calls “religious sectarian law,” which it defines as

any statute, tenet or body of law evolving within and binding a specific religious sect or tribe. Religious sectarian law includes shari’a law, canon law, halacha and karma but does not include any law of the United States or the individual states based on Anglo-American legal tradition and principles on which the United States was founded.

H.B. 2582, 15th Leg., 1st Reg. Sess. (Ariz. 2011).

I. AMERICAN LEGAL LIBERALISM AND THE RULE OF LAW

In a recent set of articles,²² legal philosopher Jeremy Waldron has developed a theory of ‘the rule of law’ that focuses on the “procedural and argumentative”²³ aspects of law, rather than the “determinacy and predictability”²⁴ aspects of law which other theorists²⁵ have stressed when thinking about the nature of ‘law’ and ‘the rule of law’ alike. In turn, Waldron has also developed an account of the rule of law that focuses on the sites where people often engage in legal *argumentation*. For Waldron, courts are such sites and, in fact, are the sites where ‘law,’ ‘legal systems,’ and ‘the rule of law’ come into being via argumentation. In this respect, Waldron has asserted:

I do not think we should regard something as a legal system absent the existence and operation of the sort of institutions we call courts. By courts, I mean institutions that apply norms and directives established in the name of the whole society to individual cases, that settle disputes about the application of those norms, and that do so through the medium of hearings—formal events that are tightly structured to enable an impartial body to fairly and effectively determine the rights and responsibilities of particular persons after hearing evidence and argument from both sides.²⁶

22. See generally Jeremy Waldron, Essay, *The Concept and the Rule of Law*, 43 GA. L. REV. 1 (2008). See also Jeremy Waldron, *The Rule of Law and the Importance of Procedure*, (N.Y.U. Sch. of Law, Pub. L. Research, Working Paper No. 10-73, 2010), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1688491. This latter paper is still only published on SSRN and is labeled a “working paper.” While this paper is ‘only’ a “working paper,” I believe my use and citation of it here—for indicating some of the problematic tendencies within liberal legal thought—is justified. Indeed, that a preliminary draft would first gesture so heavily towards the state is quite strong evidence of the state-oriented nature of much liberal legal thought. That is to say, one can see with this working paper where liberal legalism’s imagination wanders initially, and also where this imagination tends to linger.

23. Waldron, *The Concept and the Rule of Law*, *supra* note 22, at 5.

24. *Id.*

25. See, e.g., 2 F.A. HAYEK, LAW, LEGISLATION AND LIBERTY: A NEW STATEMENT OF THE LIBERAL PRINCIPLES OF JUSTICE AND POLITICAL ECONOMY 37–38 (1973) (“The chief function of rules of just conduct is . . . to tell each what he can count upon, what material objects or services he can use for his purposes, and what is the range of actions open to him” (emphasis added)).

26. See Waldron, *The Concept and the Rule of Law*, *supra* note 22, at 20; Waldron, *The Rule of Law and the Importance of Procedure*, *supra* note 22, at 10.

As central as courts are to Waldron's conception of 'the rule of law,' he has been remarkably vague as to what he means by a 'court.' To be fair, this vagueness is quite consistent with a long history of theoretical and descriptive neglect within 'the rule of law' tradition concerning 'courts' and their role in constituting 'the rule of law.' Waldron, in fact, has highlighted this past neglect in his recent work, viewing it as a lamentable shortcoming of past theorizations about 'law,' 'legal systems,' and 'the rule of law.'²⁷ At the same time, Waldron has also warned against too specifically defining what is meant by a 'court,' warning that "it would be a mistake to get too concrete [about what is meant by a 'court'] given the variety of court-like institutions in the world."²⁸

With this comment, Waldron has gestured towards the importance of legal theorization that is simultaneously transnationally and transculturally cognizant and unconcerned

27. See Waldron, *The Concept and the Rule of Law*, *supra* note 22, at 20 ("It is remarkable how little there is about courts in the conceptual accounts of law presented in modern positivist jurisprudence."). In many respects, this neglect can be traced to legal theorist Albert Venn Dicey's influential nineteenth-century work, *Introduction to the Study of the Law of the Constitution*. A.V. DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION (10th ed. 1959). The precise terminology that Dicey employs to reference state courts in *Introduction to the Study of the Law of the Constitution* is that of "ordinary courts" or "ordinary tribunals." *Id.* at 250. Dicey tells us very little about what makes a court "ordinary" other than that "the ordinary courts of the country" consist of a "judge and jury." *Id.* As inchoate as his description of them is, Dicey makes "ordinary courts" central to his conceptualization of 'the rule of law' in three different ways. Most importantly, "ordinary courts" are important to Dicey's conception of 'the rule of law,' for these institutions are the actual spaces where legal opinions securing important liberties for posterity are authored. In this respect, Dicey is impressed with the liberties that have accompanied England's 'unwritten,' judicially-crafted constitution. For Dicey, the English system of ('unwritten' constitutional) liberty is incredibly secure because it results from ordinary litigation in ordinary courts. *See id.* at 195–96. As a result, according to Dicey, it is very difficult to suspend a liberty in the English system. Such a suspension would involve far more than an impetuous declaration about the enforcement—or not—of a 'mere' constitutional document. *See id.* at 195–96, 201. Indeed, the declaration would have to extend to suspending the operations of actual institutions (i.e., courts) that the civilian population regularly accesses, uses, and needs: "Where . . . the right to individual freedom is part of the constitutions because it is inherent in the ordinary law of the land, the right is one which can hardly be destroyed without a thorough revolution in the institutions and manners of the nation." *Id.* at 201 (emphasis added).

While Dicey's linking of ordinary courts and 'the rule of law' is a somewhat belated one in his work, it is only here where one can see how courts (or comparable institutions)—as institutions and spaces where ordinary disputation occurs, and where the actual infrastructure for the entire legal system is initiated and maintained—become requisite to his theory of 'the rule of law.'

28. Waldron, *The Concept and the Rule of Law*, *supra* note 22, at 23.

with borders in any strict sense. Yet other aspects of Waldron's argument cut against such a generous read of his work. In particular, not only do these other aspects of Waldron's recent theorization of 'law,' 'legal systems,' and 'the rule of law' suggest that his definition of what is meant by a 'court' is over-invested in state-organized forms of institutional legality, but so does his further elaboration of a "procedural"²⁹ view of 'the rule of law.'

With respect to this procedural view, Waldron has seen the development of this view of 'the rule of law' as a natural (or even necessary) consequence of viewing law as an argumentative enterprise.³⁰ As a result, Waldron has developed in his recent work a laundry list of legal procedures that he feels a 'court' must adhere to if such an institution is to facilitate and ensure an argument-premised kind of 'law.'³¹ Emphasizing the importance of legal procedure to his argumentation-focused theoretical project, Waldron has written:

In many . . . discussions of the Rule of Law . . . the procedural dimension is simply ignored . . . I do not mean that judges and courts are ignored. . . . But if one didn't know better, one would infer from these [Rule of Law] discussions that problems were just brought to wise individuals called judges for their decision (with or without the help of sources of law) and the judges . . . proceeded to deploy their interpretive strategies and practical wisdom to address those problems; there is no discussion in [this literature] of the *highly proceduralized* hearings in which problems are presented to a court, let alone the importance of the various procedural rights and powers possessed by individual litigants in relation to these hearings.³²

29. See *id.* at 55, for Waldron's use of the word "procedural" to describe his preferred account of 'the rule of law.'

30. See, e.g., *supra* note 26 and accompanying text.

31. See Waldron, *The Rule of Law and the Importance of Procedure*, *supra* note 22, at 12, 17–22.

32. *Id.* at 9–10 (emphasis added). Waldron goes on to remark that in his more robust vision of 'the rule of law,' in which there are 'courts,'

the operation of a court involves a way of proceeding which offers those who are immediately concerned in the dispute or in the application of the norm with an opportunity to make submissions and present evidence (such evidence being presented in an orderly fashion according to strict rules of relevance oriented to the norms whose application is in question). The mode of presentation may vary; but the existence of such

Thus, seeking to avoid the inattention paid to actual court procedures by his intellectual predecessors,³³ Waldron has outlined in his recent work the following features that he feels a legal proceeding must embody before ‘the rule of law’ can be said to exist:

- A. a hearing by an impartial tribunal that is required to act on the basis of evidence and argument presented formally before it in relation to legal norms that govern the imposition of penalty, stigma, loss, etc.;
- B. a legally-trained judicial officer, whose independence of other agencies of government is assured;
- C. a right to representation by counsel and to the time and opportunity required to prepare a case;
- D. a right to be present at all critical stages of the proceeding;
- E. a right to confront witnesses . . . ;
- F. a right to an assurance that the evidence presented by the government has been gathered in a properly supervised way;
- G. a right to present evidence in one’s own behalf;
- H. a right to make legal argument about the bearing of the evidence and about the bearing of the various legal norms relevant to the case;
- I. a right to hear reasons from the tribunal when it reaches its decision, which are responsive to the evidence and arguments presented before it; and

an opportunity does not. Once presented, then the evidence is made available to be examined and confronted by the other party in open court.

Id. at 13–14.

33. This includes not only Dicey, but also Joseph Raz, who has written of the importance of something he vaguely calls “norm-applying organs,” RAZ, *supra* note 12, at 105, adhering to something he denotes “[t]he principles of natural justice,” *id.* at 217.

J. some right of appeal to a higher tribunal of a similar character.³⁴

Waldron has characterized this list of requirements— included in what he characterizes as a “working paper”³⁵—as a “preliminary sketch”³⁶ of a procedural account of ‘the rule of law.’ However, there are as many reasons to resist that characterization of this account as there are to endorse it.³⁷ As to resisting this characterization, it is difficult to deem Waldron’s list as truly sketch-like if one takes that description to mean something rather open-ended, and an easy starting point for further, more detailed elaboration by a wide variety of interested persons. Instead, there is a heavy and overwhelming—if also unacknowledged—reliance on state institutions in Waldron’s procedural-cum-disputation recommendations. For example, in his invocation of “formal[ity],” “legally-trained judicial officer[s],” and “agencies of government,” Waldron is clearly concerned with how the rule of law can be advanced by *state* courts or tribunals, and *only* those institutions directly coordinated by the state.³⁸ Elsewhere as well, Waldron similarly affirms his interest in “open court[s],”³⁹ “proper legal tribunal[s],”⁴⁰ and “public institutions.”⁴¹

While Waldron relies heavily on state institutions and courts in his account of ‘the rule of law,’ Waldron never tells us why *state* courts, as opposed to *non-state* legal venues, are the privileged site of ‘law’ in his account. This theoretical shortcoming is significant in light of the significant amount of dispute resolution that occurs around the world outside of state-sponsored legal institutions⁴² and the practices and procedures adhered to in such non-state institutions which

34. Waldron, *The Rule of Law and the Importance of Procedure*, *supra* note 22, at 4.

35. *Id.* at title page.

36. *Id.* at 4.

37. Oddly, in attempting to counter an ideology that veers toward a kind of sparseness and vacuity that describes both everything and nothing, Waldron’s suggestions end up suffering from *both* vagueness and cultural specificity—or, in other words, a kind of culturally-specific vagueness—making them both impracticable and undesirable for too many people.

38. *See supra* note 34 and accompanying text.

39. Waldron, *The Rule of Law and the Importance of Procedure*, *supra* note 22, at 14.

40. *Id.*

41. *Id.* at 18.

42. *See generally* Redding, *supra* note 7.

simultaneously confirm both the worth of and problems with state courts' methods of dispute resolution.

In this respect, the next Part closely examines the experiences of an Indian Muslim woman, Ayesha, and her successful initiation of a divorce suit at a Delhi-based *dar ul qaza*⁴³ in 2006. In the process, it not only explains some of the key practices and procedures of this non-state legal venue but also situates these practices, procedures, and personal experiences within a larger socio-legal context in contemporary India. Part III then takes a step back, analyzing Ayesha's experiences in light of 'the rule of law' ideology outlined and critiqued in this Part, in the process suggesting what might be gained from a future suturing of ethnography to philosophical theorizations of 'the rule of law.'⁴⁴ As Part III discusses, Ayesha's experience with the *dar ul qaza* reveals 'rule of law' potentials of non-state venues, as well as rule of law shortcomings in state courts. Indeed, putting Islamophobia aside, Part III finds it difficult to identify strong differences between (idealized) state and (actual) non-state venues—the 'high art'⁴⁵ of one, and the presumed lowliness of the other. Whether that is for the better or for the worse, this should not be surprising, given that state and non-state legal venues in any given jurisdiction are both reciprocally dependent on and influential vis-à-vis local socio-political culture.⁴⁶

43. For a definition of *dar ul qaza*, see *supra* note 18.

44. In this respect, Erin Stiles, in her work on state-run Islamic (or *Kadhi*) courts in Zanzibar, emphasizes the importance of ethnography to understanding how procedural aspects of litigation work out in actual practice. ERIN E. STILES, AN ISLAMIC COURT IN CONTEXT: AN ETHNOGRAPHIC STUDY OF JUDICIAL REASONING 63 (2009) ("It goes without saying that court documents do not tell the whole story. Although a study of documents like the [plaintiff's complaint] and [defendant's response] shows how the clerks present legal issues in a formulaic way, and the [court's judgment] illustrates the way in which a judge writes rulings, court ethnography reveals the legal understandings different parties bring to a case and sheds light on the strategies of representation involved in the creation of court documents.").

In her emphasis on the "strategies of representation" used in the "creation of court documents," Stiles is emphasizing the "discursive" aspects of courtroom procedure, where documents and outcomes are the result of a complex series of negotiations and communications between "parties, litigants, clerks, and *kadhi* [or judge]." *Id.* at 63–64. See generally BRINKLEY MESSICK, THE CALLIGRAPHIC STATE: TEXTUAL DOMINATION AND HISTORY IN A MUSLIM SOCIETY (1993).

45. I use this expression to reference Waldron's characterization of state court proceedings as "highly proceduralized." See *supra* text accompanying note 32.

46. In another context, Partha Chatterjee has written of the "mutually conditioned historicities" of elite and subaltern domains, and I believe that we see something similarly mutual in the trajectories of state and non-state legal arenas

II. AYESHA AND AN EXTRA/ORDINARY 'COURT'

[M]y uncle is a lawyer and he put me in a touch with a lawyer too in the beginning. But, you know . . . his first [instinct was] . . . to make us . . . that we'll build a case. "Build a case" means that [] they'll do all kinds of, you know, you make up your stories and you just exaggerate a lot And . . . it could take time. [My lawyer's] thing was, yeah, it's gonna take time. And I didn't want. I wanted [my divorce]. You know, I said, "I've spent 18 years [and] another five years, you know, coming and going . . . no. I don't have the time. I don't have the money. I don't have the resources, nothing."⁴⁷

—Ayesha

This Part shifts gears, from legal idealization to legal ethnography, introducing Ayesha, an Indian Muslim woman whom I got to know in the course of fieldwork that I conducted in India for eight months during 2007–2009. When I first met her, Ayesha had recently obtained a divorce from a non-state Muslim civil dispute resolution institution in Delhi (a *dar ul qaza*), and her experiences there are relevant to the purposes of this Article in a number of ways. Most notably, Ayesha is someone who has had sustained personal interaction with a *dar ul qaza*, and thus is intimately familiar with many of the procedural aspects of its operation. Moreover, as someone who is not directly or personally invested in the *dar ul qaza*—such as the presiding *qazi* (English: judge)—Ayesha is able to provide an account of *dar ul qaza* procedure that is arguably less inflected by a desire to describe it to an outsider (such as me) in a way which will enhance its prestige or protect it from outside scrutiny.⁴⁸

discussed in this Article. See PARTHA CHATTERJEE, *THE NATION AND ITS FRAGMENTS: COLONIAL AND POSTCOLONIAL HISTORIES* 12–13 (1993).

47. Interview with 'Ayesha,' in Delhi, India (June 20, 2009) (transcript on file with author).

48. *Dar ul qaza* proceedings are not publicly conducted, and I was not able to secure exceptional permission from the presiding *qazi* to sit in on and observe the proceedings. I am aware of no other scholar who has obtained permission in this respect either, nor am I aware of any literature providing a detailed account of *dar ul qaza* procedure like I am able to provide here, based on my interactions with Ayesha. See Sabiha Hussain, *Male Privilege, Female Anguish: Divorce and Remarriage Among Muslims in Bihar*, in *DIVORCE AND REMARRIAGE AMONG MUSLIMS IN INDIA* 263, 280–82 (Imtiaz Ahmad ed., 2003), for a relatively cursory discussion of *dar ul qaza* procedure (in Bihar). See also Sabiha Hussain, *Shariat Courts and Women's Rights in India* 22–24 (Ctr. for Women's Studies, Occasional

Of course, Ayesha's recounting of her experiences is only one person's story, and there are obvious methodological shortcomings associated with relying on a sample size of one. That being said, there are a number of insights that can only be gained from engaging in a detailed analysis of a single case. Following Kim Lane Scheppele, I believe that it is often the case that "knowing more about fewer cases tends to be more valuable than knowing less about more cases."⁴⁹ Moreover, as Elizabeth Povinelli has noted, such "minor encounters," such as Ayesha's experience with a Delhi *qazi*, "constitute[] as compelling . . . the theoretical and administrative problems that scholars, government officials, and other state citizens address[]."⁵⁰ As such, they are important to understand in the detail in which they transpired. Finally, following Joseph Raz, if legal theory and philosophy—including that relating to 'the rule of law'—is concerned with "the necessary and the universal,"⁵¹ a single case study, in all its rich detail, can end up unsettling extant legal theorizing (and sermonizing). As it happens, and as will be discussed further below, Ayesha's account of her experiences in front of a Delhi *dar ul qaza* is on its own able to dismantle many stereotypes about non-state legal spaces, state courts and their procedures, and also Muslim women.

Because Ayesha's story will be so surprising to many readers, this Part will proceed in two Sections. The first Section will introduce Ayesha, providing a great deal of background on her personal situation. The second Section will then discuss the details of her Delhi *dar ul qaza* divorce case. By presenting all of this detail, the goal is to be as transparent as possible, providing the reader with as much information on Ayesha and her experiences—legal and otherwise—as space permits.

Paper, 2006), available at <http://www.cwds.ac.in/OCPaper/ShariatCourts-Sabiha-ocpaper.pdf>. As might be expected, since *dar ul qaza* proceedings are not publicly observable, the decisions which result from these proceedings are also not generally publicly available, and thus it can be a challenge to identify and track down people who have been participants in *dar ul qaza* proceedings. As it happens, and as will be explained below, my meeting Ayesha was quite fortuitous.

49. Kim Lane Scheppele, *Constitutional Ethnography: An Introduction*, 38 LAW & SOC'Y REV. 389, 401 (2004).

50. POVINELLI, *supra* note 15, at 74–75.

51. See RAZ, *supra* note 12, at 104.

A. *Ayesha, Contextualized*⁵²

When I first met her in a crowded, upscale ice cream parlor in Delhi, India during the summer of 2008, Ayesha had just completed her divorce from her husband, Zeeshan,⁵³ of eighteen years. Ayesha was married at age twenty-one, after graduating with a B.A. in sociology from Jesus and Mary College in Delhi, and she had spent the past two years pursuing her divorce at a Delhi *dar ul qaza*, one jointly run by the All India Muslim Personal Law Board (AIMPLB) and the Imaarat Shariah. Both of these organizations are well-known non-governmental Indian Muslim organizations that advocate and work on political, legal, and social issues of relevance to India's Muslim communities.⁵⁴ Both organizations also work together to run various non-state *dar ul qazas* around India⁵⁵—institutions whose *qazi* services must be distinguished from government-sponsored *qazi* services provided in some Indian states under the explicit authority of government legislation.⁵⁶

I was put in contact with Ayesha through a female relative of hers who worked for the women's wing of a well-known, secular Indian political party. I came into contact with Ayesha's relative as I was just beginning fieldwork; she was one of many people whom acquaintances had suggested I contact upon arriving in Delhi. Ayesha's relative suggested that I call Ayesha, and provided me with her mobile phone number. As a result, our first meeting was organized over the

52. In the remaining Parts, citations to the interview with Ayesha, except for quoted material, will be omitted.

53. Not his real name.

54. For background information on the All India Muslim Personal Law Board, see generally Justin Jones, *'Signs of churning': Muslim Personal Law and Public Contestation in Twenty-first Century India*, 44 MOD. ASIAN STUD. 175, 181–95 (2010). For background information on the Imaarat Shariah, see generally Papiya Ghosh, *Muttahidah qaumiyyat in aqalliat Bihar: The Imaarat i Shariah, 1921–1947*, 34 INDIAN ECON. & SOC. HIST. REV. 1 (1997).

55. For general information on, as well as a critical analysis of, the operation of this system, see generally Hussain, *Male Privilege, Female Anguish*, *supra* note 48; Hussain, *Shariat Courts and Women's Rights in India*, *supra* note 48.

56. In addition to the Imaarat Shariah and the All India Muslim Personal Law Board, other non-governmental Muslim organizations (e.g., the Jamaat-e-Islami and the Jamiat Ulema-i-Hind) run dispute resolution services of different types and formats around India as well. All of these services should be distinguished from the (state-sponsored) *qazi* services described by Sylvia Vatuk in her work. See, e.g., Sylvia Vatuk, *Divorce at the Wife's Initiative in Muslim Personal Law: What Are the Options and What Are Their Implications for Women's Welfare?*, in REDEFINING FAMILY LAW IN INDIA: ESSAYS IN HONOUR OF B. SIVARAMAYYA 200 (Archana Parashar & Amita Dhanda eds., 2008).

phone and I had little sense, other than a voice, of the person I was to meet.

At the upscale, popular hangout spot that we had decided upon for our first meeting, Ayesha fit seamlessly into the crowd. Like the people around us, she was dressed stylishly and had a youthful air to her. We spoke to each other in English, this being the language in which Ayesha seemed to feel most comfortable speaking. While I felt shy and tentative at this first meeting, not feeling comfortable asking a stranger intimate questions about her personal life and marital troubles, I was surprised at how comfortable Ayesha appeared to be in talking about her life and, in particular, the divorce proceeding that she had just concluded. Over this first meeting, I remember thinking that Ayesha seemed remarkably composed for someone who had just recently ‘completed’ what is often a wrenching emotional and legal experience, i.e., a divorce.

I put the term ‘completed’ in scare quotes not only because of the lingering legal, social, and psychological side effects that often accompany the end of a marriage, but also because the legal status of the divorce that Ayesha had just obtained from the *qazi* in the Delhi *dar ul qaza* is somewhat unclear. The enforcement of Islamic law in India depends on a complex interaction of non-state and state legal practices, and there is as much history and ordinariness behind this interaction⁵⁷ as there is continuing uncertainty over some aspects of it,⁵⁸ including the recognition that state courts will afford the divorces obtained by Muslim women in non-state venues.⁵⁹ In

57. See generally GOPIKA SOLANKI, ADJUDICATION IN RELIGIOUS FAMILY LAWS: CULTURAL ACCOMMODATION, LEGAL PLURALISM, AND GENDER EQUALITY IN INDIA 267–69 (2011).

58. See, e.g., Narendra Subramanian, *Legal Change and Gender Inequality: Changes in Muslim Family Law in India*, 33 LAW & SOC. INQUIRY 631, 653 (2008) (noting that even after a landmark Supreme Court of India opinion limiting the exercise of Muslim men’s unilateral ‘triple-talaq’ divorce rights, “some judges and lawyers in the lower courts were either unaware of or misunderstood this landmark judgment”).

59. While the reported case law concerning state recognition of Muslim women’s non-state divorces is sparse, there are some indications that India’s judiciary views these divorces unfavorably. See, e.g., *K.C. Moyin v. Nafeesa*, 1 MLJ 754 (1972). Indian Islamic legal scholar Tahir Mahmood has been critical of this decision, arguing that “as long as Muslim husbands are free to pronounce [a unilateral] extra-judicial divorce, Muslim wives’ right to do the same cannot, and should not be, taken away.” TAHIR MAHMOOD, ISLAMIC LAW IN INDIAN COURTS SINCE INDEPENDENCE: FIFTY YEARS OF JUDICIAL INTERPRETATION 478 (1997). In addition, in another relevant decision issued during the colonial period, the Lahore High Court observed with disparagement that

short, the legitimacy and effect that the Indian state will accord the Delhi *dar ul qaza qazi*'s out-of-state-court decision to grant Ayesha a divorce is unclear. However, after speaking with her, it appears that for Ayesha, for her family and friends, and for the community of Muslims and non-Muslims with whom she is in regular contact, Ayesha is considered divorced, with all the attendant disabilities and opportunities that that status affords.

After this first meeting, Ayesha and I remained in contact, and I met with her again when I returned to Delhi in the summer of 2009. I met her twice during that summer. The first time, she asked me to meet her in a stylish café located just off the lobby of a major five-star hotel in Delhi. This café meeting spot was especially convenient for Ayesha, as she worked in a high-end boutique located in the same five-star hotel. I was surprised to learn of her place of employment, but was also able to better understand both Ayesha's ability to and need to—as part of her job—dress to the nines.

I found speaking with Ayesha to be revelatory, not least because she upset nearly all the preconceptions that many people have about the typical user of a 'Muslim court,' especially in India. Indeed, rather than being poor, illiterate, or otherwise abject, she and her family belonged to India's 'Muslim social elite,' a social categorization she described to me in the following way:

I come from a family background, that is . . . politically . . . connected and, you know. . . we would, yes, be in the social elite. But . . . we are middle class people, but we're not lower and we're not really upper because I'm not rich. . . . [Y]ou know, you're in the middle, but you're well off. . . . [Y]ou're managing your life very well—and you live well—and . . .

[b]oth the lower Courts appear to have treated a case of dissolution of marriage like any other case which could be settled by an oath or arbitration and in this both of them were mistaken. They should have taken care . . . that in a case of this kind it is the Court which has to perform the functions of a Qazi and it is the pronouncement of the Court which dissolves the marriage and that function could not be delegated by the Court to anyone else. . . . [The] dissolution of marriage [is] a function which cannot be exercised by any body or tribunal other than the Court and in no other way except on consideration of the evidence led in the case.

Abdul Ghani v. Mt. Sardar Begum, AIR (32) 1945 Lahore 183, 184.

you're part of this . . . "the Muslim social elite," as such, you know?⁶⁰

And, in fact, Ayesha's extended family did appear to be quite socially connected. As indicated earlier, I learned of Ayesha and her situation through a female relative of hers who is active in national politics. And Ayesha indicated to me that an uncle of hers was also in politics. That being said, she and her family do not appear to be 'rich.' After our first two meetings in public, including the meeting near her workplace, Ayesha invited me to her family's home. The home was located in a solidly upper-middle-class Delhi colony, one which is almost exclusively Muslim. Ayesha kept a separate apartment on the second floor of the family home, where she lived with her teenage son. Both the family home and her individual apartment were certainly comfortable, but not lavish.

In this respect, while Ayesha was—to use her own words again—"managing [her] life very well,"⁶¹ her resources were not unlimited. In fact, money was one of the issues that came up when I asked Ayesha what she had found attractive about her *dar ul qaza* experience. Specifically, Ayesha described the benefits of the *dar ul qaza*, as opposed to the state's courts, in the following manner:

[The *dar ul qaza*] was faster than the legal courts, um, you know, um, and I think it was, I would say more, um, not say friendly but it was, uh, the legal courts, you know, I mean, from what I hear from this friend of mine, you know you go there and nobody is bothered . . . it's like a process that. . . even though here too it's like a process too but at least you're interacting on a one-to-one with somebody. . . . So, it, it was a bit more personal, I think, so . . . and, and also it was cheaper, much cheaper to do it. I mean, you know, we didn't spend that much money on, on it, this which I might have had to in the legal courts.⁶²

60. Interview with 'Ayesha,' *supra* note 47.

61. *Id.*

62. *Id.* This concern with the costs and delays associated with litigation in the state's courts was echoed elsewhere in Ayesha's comments to me, *see, e.g.*, text accompanying *supra* note 47, and has also featured prominently in responses to the constitutional petition in *Vishwa Lochan Madan v. Union of India*, both by the Indian government (in its responsive counter-affidavit) and by the All India Muslim Personal Law Board (in its responsive counter affidavit). And, indeed, this perception of the problems that plague Indian state courts is a common one in Indian society. For more discussion of this common perception, as well as the

Ultimately, while Ayesha approached a Delhi *dar ul qaza* seeking to avoid the costs and prolonged delays of the state court system—what one might characterize as the ‘legal surplus’ associated with state courts—what she experienced in front of the *dar ul qaza* was not itself ‘law-less.’ That being the case, her experiences in front of the *dar ul qaza* demonstrate the uncertain value of ‘the rule of law’ that she experienced there. I will engage in a deeper analysis of all this in Part III. However, before getting to that analysis, the next Section of this Part takes up the details of Ayesha’s experience with getting a divorce from a Delhi *dar ul qaza*. Again, the details that I provide below come from Ayesha’s portrayal to me of her experience getting a divorce judgment from this *dar ul qaza*, as well as documents pertaining to her *dar ul qaza* divorce that she provided.

B. *Ayesha’s Divorce, Contextualized*

By Ayesha’s own account, she became divorced in 2008. As proof of her divorce, Ayesha provided me with a statement of the decision by the resident *qazi* of the Delhi *dar ul qaza* to dissolve her marital bond, which was inscribed on letterhead, in both English and Urdu, with “Darul Qaza, South Delhi, (All India Muslim Personal Law Board).”⁶³ She also provided me with a notarized “English Rendering of Original in Urdu,”⁶⁴ which she had stapled on top of the original statement of her divorce. Besides the letterhead and address information, this original statement was rendered entirely in Urdu. This English Rendering contained the following “*hukm*” (English: order) issued by the Delhi *qazi*:

In the light of chasm in relationship, extremely bitter hatred, total detachment and loss of confidence in each other and with a view to avoid and suppress further ill feelings, I hereby annul the bond of Nikah between Plaintiff [Ayesha] and Defendant [Zeeshan]. Now therefore the Plaintiff ceases to remain the wife of the Defendant and

Indian government’s and All India Muslim Personal Law Board’s arguments in this case, see Redding, *supra* note 7.

63. English Translation of Order and Judgment of Darul Qaza (India) (on file with author) (original in Urdu).

64. *Id.*

after the period of 'Iddat' she would be free to exercise her own will and choice.⁶⁵

Ayesha had the original *hukm* translated into English because Urdu—or, at least, the formal, legalistic Urdu used by the *qazi*—was neither her nor her immediate family's strongest skill. Indeed, Ayesha explained to me that a female acquaintance, Khalida Auntie,⁶⁶ who was familiar with Islamic law, had helped her write out her original divorce application to the *dar ul qaza*. When I asked her why she had not composed this application herself, Ayesha responded:

Because it has to be done in Urdu. And, I'm sorry, even my mother can't write it in Urdu. And, you know, [Khalida Auntie is] also familiar with language, I suppose. How to write it, and what to write, and, you know, since [Khalida Auntie is] involved in all of this, so, uh, uh, you know, and my mother thought that it was the best that, you know, [Khalida Auntie] writes it.⁶⁷

In addition to this English translation of the *hukm*, Ayesha also shared with me a notarized English translation of a lengthy "*faisla*" (English: decision/judgment) also prepared by the *qazi* in her case, originally in Urdu.⁶⁸ This *faisla* ends in the aforementioned *hukm*, but unlike the separate *hukm-qua-hukm* document described above, it contains a lengthy statement of Ayesha's testimony to the *qazi*, as well as the testimony of witnesses to the *qazi* on Ayesha's behalf.

According to the testimony of Ayesha quoted (and otherwise paraphrased) in this *faisla*, Ayesha's problems with her husband Zeeshan began to develop very soon after their marriage in 1988. As the *qazi* in this case quoted Ayesha's statement (what the English translation refers to as her "Plaint") of her marital problems:

65. *Id.* at 7.

66. Not her real name. Ayesha used the term 'Auntie' (in a non-familial sense) when referring to 'Khalida' and so I will follow Ayesha's word usage (and order) in referring to this woman as 'Khalida Auntie.'

67. Interview with 'Ayesha,' *supra* note 47. At another point in our interview, Ayesha told me that her verbal communication with the *qazi* transpired in Urdu, but that was possible because "spoken Urdu is easy to understand" while written communication used a certain "kind of difficult words." *Id.*

68. English Translation of Order and Judgment of Darul Qaza, *supra* note 63.

The Defendant has been suffering from doubt and suspicion even before our marriage and since our marriage the [D]efendant has been doubting my character as well. In the event of our participating in any party, if I had talked to any of Defendant's friend then the Defendant would interpret that I had more liking for that man. Or if the Defendant had brought home any of his friends, whom we had entertained, then on his departure the Defendant would say that while I was sitting in front of the visitor my hand had touched his hand in such a fashion as if I had more liking for him whereas there never had been anything of this nature in my mind. On my attempts to disprove the allegations he would express his disapproval and anger so much that he would start abusing me and throwing away household goods/articles and breaking them.⁶⁹

The *faisla*, quoting Ayesha, cites a number of instances where Zeeshan's "suspicion and doubt" exploded into violence or other troubling reactions. Indeed, "mutual quarrels had . . . started immediately after our marriage and there were fewer days when there was no quarrel[;] rather every day was a day of fighting."⁷⁰

As a result of this interpersonal tumultuousness, the *faisla*, quoting Ayesha, describes two instances where Ayesha decided to separate from Zeeshan. The first occurred about a year-and-a-half after the birth of their son, and the separation lasted for approximately a month, after which Ayesha "spoke to the Defendant and on certain terms and conditions, set out by either side, we mutually agreed to resume living together."⁷¹ A second separation occurred when Ayesha and Zeeshan's son was four years old. With respect to this second separation, the *faisla* describes how Ayesha "got [her] 'khula' [divorce] papers prepared"⁷² and sent them to her husband, but that Zeeshan "did not give his consent."⁷³ Consequently, "in the interest of keeping the family life intact and with the view that our child may grow under the protection of both the parents I relented, and in consultation with the Defendant, we resumed living together."⁷⁴

69. *Id.* at 1.

70. *Id.* at 2.

71. *Id.*

72. *Id.*

73. *Id.*

74. *Id.*

Home life was far from peaceful after this second separation, however, and Ayesha's happiness and psychological stability deteriorated over the next several years, so much so that Ayesha "had developed a feeling either [that she] would be a victim of some accident or [that she] might commit suicide."⁷⁵ Finally, in July 2006, Ayesha again decided to separate from her husband and moved in with her parents. She again tried to get Zeeshan to sign " 'Khula' papers,"⁷⁶ yet still failed to convince him to do so.

At that point, according to her testimony presented in the *faisla*, Ayesha decided to approach the *dar ul qaza* to ask for a *khula* divorce. Ayesha's testimony in the *faisla* described this turn of events by simply stating that, following her unsuccessful attempt to convince Zeeshan to sign " 'Khula' papers"⁷⁷: "I applied to 'Darul Qaza' as well for 'Khula' but that too did not materialize."⁷⁸

In my discussions with her, Ayesha provided me with a great deal more background on why her first attempt at getting a *khula* divorce from this Delhi *dar ul qaza* was unsuccessful,⁷⁹ and why she ultimately returned to the *dar ul qaza* to—as the English translation of the Urdu *faisla* described it—"annul"⁸⁰ her marriage. From my conversations with Ayesha, it is clear that in her second application to the Delhi *dar ul qaza* her request for an annulment was (in technical terms) a request for a *faskh* divorce. A *faskh* divorce is a type of Islamic divorce which is distinguished from *khula* divorce (in many but not all jurisdictions) by the lack of a requirement that the husband

75. *Id.* For more discussion of the ominous implications of this statement, alluding to the potential that suicide in these situations may just masquerade for domestic violence, see PERVEEZ MODY, *THE INTIMATE STATE: LOVE-MARRIAGE AND THE LAW IN DELHI* 256–57 (2008).

76. English Translation of Order and Judgment of Darul Qaza, *supra* note 63, at 2.

77. *Id.*

78. *Id.*

79. See STILES, *supra* note 44, at 63 (discussing the incompleteness of legal documents); Iris Agmon, *Muslim Women in Court According to the Sijill of Late Ottoman Jaffa and Haifa: Some Methodological Notes*, in *WOMEN, FAMILY AND DIVORCE LAWS IN ISLAMIC SOCIETY* 126 (Amira El-Azhary Sonbol ed., 1996) (discussing methodological challenges when interpreting legal records and documents, with their many silences, siftings, and shifts vis-à-vis reality).

80. English Translation of Order and Judgment of Darul Qaza, *supra* note 63, at 3.

consent to the divorce.⁸¹ However, unlike with *khula* divorces, a *faskh* divorce requires a third-party (e.g., a judge, or a *qazi*) to effectuate it.⁸²

As to Ayesha's initial application for a *khula* divorce, as indicated earlier, Khalida Auntie had helped Ayesha compose and file this first application to the Delhi *dar ul qaza*. After this first application was filed, and over a period of a year, the Delhi *qazi* interviewed Ayesha approximately half a dozen times about her marriage and the circumstances of its breakdown. Additionally, two men—who Ayesha alternatively referred to as a “jury”⁸³ and an “investigating party who want to . . . validate all the stuff by themselves to make sure”⁸⁴—visited Ayesha on behalf of the Delhi *dar ul qaza* to speak with her about the circumstances of her marital breakdown. Finally, the Delhi *qazi* also took testimony from three male witnesses provided by Ayesha as to the marriage, its breakdown, and generally speaking, “the story and the situation.”⁸⁵ Ayesha's husband, Zeeshan, was mostly uncooperative with the *dar ul qaza*'s process and ultimately withdrew from any participation in the proceedings, notwithstanding hiring a lawyer to send threatening messages to the *qazi* who was hearing Ayesha's divorce application.⁸⁶

Indeed, it was Zeeshan's lack of participation and cooperation that finally doomed Ayesha's initial application for a *khula* divorce, since *khula* requires the husband's consent for the divorce to be effectuated.⁸⁷ As Ayesha described the day she received the *qazi*'s verdict vis-à-vis her first divorce application:

That was the day the *khula* was not possible because [Zeeshan] is refusing to sign it. And I remember that when we went to collect that verdict . . . I asked [the *qazi*], I said “So, so why did you not tell [me that my husband's consent was required] from the beginning?”⁸⁸

81. For a description and discussion of *faskh* divorce and the various (and confusing) terminologies used to refer to it in different jurisdictions, see DAVID PEARL & WERNER MENSKI, *MUSLIM FAMILY LAW* 284–85 (3d ed. 1998).

82. See 2 *THE ENCYCLOPEDIA OF ISLAM* 865 (B. Lewis, Ch. Pellat & J. Schacht eds., 1983) (“*faskh*” entry).

83. Interview with ‘Ayesha,’ *supra* note 47.

84. *Id.*

85. *Id.*

86. *See id.*

87. *See supra* text accompanying notes 81–82.

88. Interview with ‘Ayesha,’ *supra* note 47.

Eventually, Ayesha did learn that there was another alternative type of Islamic divorce available—that of the judicial *faskh*—which would not require Zeeshan’s consent. Significantly, Ayesha did not learn of this divorce from the *qazi* himself, or other people directly associated with the *dar ul qaza*. In fact, as Ayesha remarked to me:

The dar ul qaza, the priest there, the qazi, he doesn’t give you advice. He just . . . you know if you ask him also, he’ll just tell you point-blank, “No, that’s not my job.” He, in fact, said, you know, “You have to go and ask around yourself. You know, ask other people who know the law.” But, he will never give you the advice as to what you should do, what you shouldn’t be doing, in order to speed up the process. Even if he believed it was right, you know, he wouldn’t. . . . That’s the impression I had of him.⁸⁹

Without the assistance of the *qazi* or other *dar ul qaza* officials, Ayesha’s discovery of the possibility of a *faskh* divorce was the product of frustration and fortuity. Still reluctant to go to the state court system to ask for a divorce,⁹⁰ Ayesha and Khalida Auntie began to ask other people for help. In Ayesha’s words:

A: Yeah, it took a year to do this whole thing. And, uh, so it was very frustrating and then, then [Khalida Auntie] got into the act of talking to . . . I keep forgetting the . . . there is some, uh, Islamic, uh, school or something?

J: The Islamic Fiqh Academy?

A: Yes! Somebody from there that [Khalida Auntie] knows, she set up a meeting for me with these two gentlemen from there. One was a very young boy; one was a Middle Eastern guy. And, uh, we spent the day at [Khalida Auntie’s] house talking about it. I showed him my application. And that gentleman immediately said that, “But you know, you’re saying, asking for khula. But it’s not possible to get without the consent of the man.” And then he took out this book, which, detailed and said how this is how it is. So, [Khalida Auntie] said, that, that you know “We didn’t know and what does it mean? And, you know, it was like the Qur’an had says, you can ask for the khula, so who’s right?” You know, she was battling . . . she was battling with them on a

89. *Id.*

90. *See id.*

different level. But at the same time she was concerned that, you know, my, my case should not get jeopardized. She didn't want to antagonize them because we needed their help . . . So, then this gentleman, I think he's the one who wrote my application out, and said in the end that since *khula* is not possible, that ask for the *nikah-e-faskh*, you know, that [Zeeshan] should have everything. And he said that is what . . . he said, in fact, if you had written that in the first application, you would have got the thing in this. But since you didn't . . . so we said "But, you know, we didn't know."⁹¹

Based on this advice, Ayesha re-filed her claim in the *Delhi dar ul qaza*, this time making sure to ask for a *faskh* divorce. When I asked Ayesha what the *qazi's* reaction was to her representation of her factual situation, though this time paired with a new kind of remedial request, she characterized his reaction as follows:

Nothing. In fact, he opened a new file. It's like a, like a, you know . . . like, like a machine . . . he just works, you know. And he's . . . he asked me the same questions. And he did the same process of writing it again.⁹²

This similarity in process notwithstanding, Ayesha did notice that, with her *faskh* divorce request, the *qazi* required her to present half-a-dozen witnesses, compared to the three that she presented with her *khula* divorce request.⁹³ Two of these new witnesses that Ayesha presented were women. Another difference between the *khula* and *faskh* divorce 'trial' that Ayesha noted was that the nature of the factual questions that the *qazi* asked her second set of witnesses were more extensive and specific than the questions he asked of her witnesses previously. This might have been due to the *qazi's* reluctance to 'annul' a marriage without a husband's participation and consent⁹⁴—Ayesha indicated to me that she felt that "they're not in favor of the women asking for [divorce]"⁹⁵—though it may have also been due to the fact that,

91. *Id.*

92. *Id.*

93. In his *faisla*, the *qazi* only quotes testimony from Witnesses No. 2, 4, 5, 6, and 7. English Translation of Order and Judgment of Darul Qaza, *supra* note 63 (identifying witnesses only by number and not by name or gender).

94. Zeeshan again refused to participate in the proceedings. *See* Interview with 'Ayesha,' *supra* note 47.

95. *Id.*

according to Ayesha, the *qazi* did not involve a jury/investigative committee in the proceedings this second time around.⁹⁶

In total, the adjudication of Ayesha's second (*faskh*) divorce claim took another year to complete. Ultimately, however, she prevailed and the Delhi *qazi* granted Ayesha her *faskh* divorce, noting that "inspite [sic] of Plaintiff's demand for 'Khula' the Defendant has not 'released the wife with grace' and further more [sic] the Plaintiff continues to be in a suspended state which is cause of her suffering."⁹⁷ Additionally, as the "[r]emoval of suffering is part of the duties of 'Qaza,'"⁹⁸ by the order of the *qazi*, "the Plaintiff ceases to remain the wife of the Defendant."⁹⁹

III. THE RULE OF NON-STATE LAW?

This Part explores how Ayesha's experience with a Delhi *dar ul qaza* demonstrates inadequacies with American liberal legalism and American legal nationalism,¹⁰⁰ and their shared inability to incorporate ordinary, non-state-premised Islamic legal practices within their worldviews. With respect to American liberal legalism, as universal and relevant as this ideological tradition purports to be, it has not been able to either acknowledge or describe the kind of non-state legal landscape that Ayesha confronted in Delhi, with important theoretical, practical, and political ramifications. These political ramifications—or rather, shortcomings—are especially fraught in the present political moment in the United States and elsewhere, with shari'a anxiety and Islamphobia at perilously high levels. Indeed, because of its myopic approaches and qualities, American-style liberal legalism cannot offer a robust defense of non-state 'shari'a courts' by, for example, providing an account of how they can play an integral role vis-à-vis 'the rule of law.' Nor can this liberal legalism provide a nuanced evaluation of current understandings of 'the rule of law' in the first instance by focusing on how these understandings and practices work (or fail to work) in practice.

96. *See id.*

97. English Translation of Order and Judgment of Darul Qaza, *supra* note 63, at 6.

98. *Id.* at 6.

99. *Id.* at 7.

100. *See id.* at 2–3.

Ultimately then, American legal liberalism becomes largely toothless in the face of attacks launched by American legal nationalists on non-state ‘shari‘a actors’—attacks which typically deploy highly-stylized and highly-ideological accounts of a state-centered ‘rule of law.’

Given this unfortunate state of affairs, a better way to think about ‘law,’ ‘legal systems,’ and ‘the rule of law’ needs to be developed. This Part begins to develop such a better account by demonstrating how the non-state *dar ul qaza* which Ayesha utilized was not a ‘lawless’ space. Indeed, the *dar ul qaza*’s practices and procedures can be read in a way which demonstrates the *dar ul qaza*’s solicitude for the kind of argumentation-oriented proceduralism that Jeremy Waldron describes in his recent work on ‘the rule of law.’¹⁰¹

For example, and as the following two Sections will discuss, the *dar ul qaza*’s solicitude for tightly-structured proceduralism¹⁰² can be seen in (1) the manner in which Ayesha had to twice petition the Delhi *dar ul qaza* for her divorce, and (2) the representation and assistance provided to Ayesha by various non-lawyers during the course of Ayesha’s two-year effort to secure a divorce from the Delhi *dar ul qaza*. That being the case, these two Sections will also briefly raise the possibility that certain kinds of ‘rule of law’-oriented proceduralism are of questionable value, whether found in state or non-state legal spaces. Ultimately, then, I aim to suggest in this Part that ‘the rule of law’ can be both omnipresent, i.e., present in both the state and non-state domains, but also of ambivalent value. I believe that this more nuanced account of ‘the rule of law’ and where it both *does* and *should (not)* exist is necessary at the present moment, even if it is largely lacking amongst American legal nationalism and liberalism alike.

A. *Pleading, Inside and Outside State Courts*

The first requirement on Waldron’s list of procedural requirements that a legal proceeding must embody, before ‘the rule of law’ can be said to exist, is that said legal proceeding must involve “a hearing by an impartial tribunal that is

101. See *supra* Part I.

102. See RAZ, *supra* note 12, at 219 (stating that “[t]he one area where the rule of law excludes all forms of arbitrary power is in . . . the judiciary where the courts are . . . to conform to fairly strict procedures”).

required to act on the basis of evidence *and argument presented formally before* it in relation to legal norms that govern the imposition of penalty, stigma, loss, etc.”¹⁰³ One way of interpreting Waldron’s requirement here is to read it as requiring courts to have a regularized set of rules by which to take cognizance of (legal) disputes brought to them or, in other words, that courts abiding by ‘the rule of law’ must enforce ‘rules of pleading.’

In this respect, it is clear that Ayesha faced difficulty in pleading her divorce case to the Delhi *dar ul qaza* in a manner such that it felt it could grant her relief. As discussed above, Ayesha first requested a *khula* divorce from the *dar ul qaza*, and, when it was not possible for the *dar ul qaza* to grant her that kind of relief, Ayesha returned to the *dar ul qaza* on the same set of facts but pleading for a different kind of relief—a *faskh* divorce, which she subsequently received.

While it is easy to read Ayesha’s frustrating experience of—on the same set of facts—having to twice go to the *dar ul qaza* as evidence of an overly-bureaucratic and obstructionist mindset within the Delhi *dar ul qaza*, there is another more proceduralistic interpretation of this situation available. Indeed, one can view this ‘bureaucratic’ mindset as a manifestation of a procedural requirement that parties’ complaints must be ‘well-plead.’ In the American federal court system, for example, Rule 8(a) of the Federal Rules of Civil Procedure requires that plaintiffs present their claim via “a short and plain statement . . . showing that the pleader is entitled to relief.”¹⁰⁴ Rule 8(a) has been interpreted, again and again, to require a plaintiff to state *her* legal claim, *as well as all necessary supporting facts*, at the real risk of facing dismissal of her claim.¹⁰⁵

Two procedural/legal ideas are at play here. The first is that of ‘party autonomy,’ or the general idea that parties are in charge of their own cases. This procedural view of litigation is the dominant one in a number of state jurisdictions, and it views the judge’s role as that of an umpire: the parties develop their respective arguments on their own, and the judge ‘judges’

103. Waldron, *The Rule of Law and the Importance of Procedure*, *supra* note 22, at 4 (emphasis added).

104. FED. R. CIV. P. 8(a)(2) (emphasis added).

105. See generally *Ashcroft v. Iqbal*, 556 U.S. 662 (2009); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007).

those arguments of which he is a passive recipient.¹⁰⁶ Something like this, in fact, can be seen in the *qazi's* behavior in Ayesha's case.¹⁰⁷

The second is a procedural stance, also adopted in a number of state jurisdictions (such as the U.S. federal judicial system), requiring that a party's initial (written) complaint contain enough information to inform both the court and the opposing party as to the nature of the dispute, and the *prima facie* plausibility of the plaintiff's claim.¹⁰⁸ Accordingly, if a party's claim requires *x*, *y*, and *z* to be established as 'elements' of the claim, the party's (written) complaint must include statements as to *x*, *y*, and *z*, giving the court and opposing party notice as to the gist of the legal complaint, and demonstrating that there is some potential viability of this claim to warrant further litigation of it beyond the initial complaint stage. For example, in a civil suit claiming unlawful job retaliation for cooperation with a criminal investigation of one's employer, in order to succeed on her claim, a plaintiff-employee may¹⁰⁹ be required to state in her complaint that not only were the reasons for her termination of employment illegitimate (e.g., motivated by retaliation), but that she also had the type of employment (e.g., salaried) the loss of which constitutes an actual harm to her person or property.¹¹⁰

Again, both procedural ideas are at play in the American federal judiciary, a judiciary that one suspects Waldron would include within his conception of "highly proceduralized"¹¹¹ courts adhering to 'the rule of law.' One might also see both of these ideas operating within the Delhi *dar ul qaza*. On this

106. Martin Shapiro describes something similar to this passive judicial role when describing how "[a] striking feature of European and Anglo-American court systems in general is the extent to which the complaining party in civil suits must shoulder the burden of getting the other side into court with relatively little assistance from the court itself." MARTIN SHAPIRO, COURTS: A COMPARATIVE AND POLITICAL ANALYSIS 13 (1981).

107. See *supra* text accompanying note 89.

108. See generally *Ashcroft v. Iqbal*, 556 U.S. 662 (2009); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007).

109. I say 'may' here because it depends on how the relevant jurisdiction defines the particulars of this kind of (job retaliation) offense.

110. See generally the facts involved in *Haddle v. Garrison*, 525 U.S. 121 (1998).

111. See *supra* text accompanying note 34. However, in this respect, it must be emphasized that the Federal Rules of Civil Procedure were part of an attempt to simplify the procedural aspects of litigation in the federal courts, moving these courts away from "high procedure" to something more basic and intuitive. See STEPHEN C. YEAZELL, CIVIL PROCEDURE 336–39 (7th ed. 2008).

view, the Delhi *qazi* treated Ayesha in a manner similar to how an American federal judge would treat an American plaintiff appearing in front of a federal court: It was Ayesha's duty to investigate the different legal claims (for divorce) that she could bring in the *dar ul qaza*, and it was her responsibility to plead (and subsequently prove) sufficient facts to make out her claim.¹¹²

As understood in many jurisdictions (including this Delhi one), *khula* and *faskh* are different types of divorce, embodying different pre-conditions for their legal effectuation.¹¹³ As the *qazi* might have seen it, Ayesha was the master of her situation and claim, and she initially chose to ask for a *khula* divorce. In other words, it was not the *qazi*'s job to write Ayesha's complaint; his only task was to determine whether the requisite elements had been satisfied such that *khula* would obtain. Since a husband's consent is one requisite element for a *khula* divorce to be effectuated, and since Ayesha had not been able to elicit this consent, the *khula* claim failed.¹¹⁴ The situation was different with a different legal claim, however. For a *faskh* divorce, a husband's consent is not a requisite 'element' (or, in other words, a relevant factor).¹¹⁵ Hence, Ayesha's continuing inability to convince her husband to consent to this kind of divorce would be irrelevant, legally speaking. And indeed, despite this lack of consent, the *qazi* in Ayesha's case was able—and did—grant Ayesha this particular kind of divorce once Ayesha actually asked for it in her pleadings.

None of this is to say that the *qazi*'s actions in Ayesha's case were exemplary, or what one would necessarily desire from the operations of a court, whether state or non-state. But it is to say that one can find the rule of procedural law operating in non-state contexts. In other words, we can see that state courts have no necessary monopoly over hearings conducted according to 'high'¹¹⁶ procedure. However, that being said, it remains an open question as to whether this tightly-structured proceduralism serves either law or justice; both the Delhi *qazi*'s treatment of Ayesha's claim and many examples

112. See *supra* text accompanying note 91.

113. See generally PEARL & MENSKI, *supra* note 81.

114. In fact, one might view the *qazi* as actually being quite lenient toward Ayesha's claim, in that he did not immediately 'dismiss' it when it was apparent she did not have her husband's consent to a *khula* divorce.

115. See generally PEARL & MENSKI, *supra* note 81.

116. See *supra* text accompanying notes 45–46.

from the American federal context¹¹⁷ give one pause to wonder about the value of this kind of law ruling the day.

B. Counseling Without ‘Counsel’

In Waldron’s ‘procedural account’ of ‘the rule of law,’ lawyers play a necessary role. Indeed, for Waldron, there must be “a right to representation by counsel,”¹¹⁸ counsel’s presence apparently signifying the existence of court hearings conducted with adequate disputation and, hence, in accordance with the rule of law. However, what Waldron means by “counsel” is left undefined.

Without venturing to attempt my own definition here of who (or what) qualifies as ‘counsel’ (or a ‘lawyer’), it is safe to say that no one with those titles assisted Ayesha in front of the Delhi *dar ul qaza*. In fact, Ayesha’s distaste for lawyers was conveyed to me not only in the excerpt from her interview which opened Part II, but also in additional remarks she made when I asked her whether she would recommend the *dar ul qaza* to other people in her situation:

J: [W]ould you recommend going to the dar ul qaza to other people?

A: I think so, I mean, it’s, yeah. I mean, but, with, with my, now not knowing all this would make sure that people should get, you know, little bit more advice before they go in and file the application so you know. Because I think it’s an easier process, why not? Because the legal courts [] . . . they just . . . the lawyers first of all, you know. And then this whole thing about making cases, you know, against the person . . . I mean, it just gets dirty, messy, so unless, of course, you’re wanting some money out of the person and, you know, you know serious kind of issues like that, then I suppose.¹¹⁹

As her remarks suggest here (and at the start of Part II), lawyers *qua* lawyers are understood by Ayesha to embody dirtiness, deception, and deceit. This is consistent not only with a joke that has often been made to me during my fieldwork,

117. See, e.g., *Ashcroft v. Iqbal*, 556 U.S. 662 (2009); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007).

118. See *supra* text accompanying note 34.

119. Interview with ‘Ayesha,’ *supra* note 47.

playing on a subtlety in pronunciation which differentiates the word ‘lawyer’ from that of ‘liar’ (in English), but also anthropological evidence gathered as far afield as Yemen and, in the Indian context, Rajasthan.¹²⁰ On this view of things, lawyers embody the furthest thing from the rule of law in the way that they turn disputation into a game of dramatic lies, tactical court absences, and unrelenting fees. In fact, while Ayesha avoided bringing a ‘lawyer’ to the Delhi *dar ul qaza*—by her own choice, and not per any rule explicitly expressed by the *qazi*¹²¹—she suspected that the first adverse decision she received from the *qazi* was partially attributable to threats that a lawyer hired by her ex-husband Zeeshan had made to the *qazi*.¹²²

But this is not to say that Ayesha did not seek or want—to use two Waldronian terms¹²³—‘counsel’ or ‘representation’ of a different sort. Her initial plea to the Delhi *dar ul qaza* was composed for her by Khalida Auntie. When that plea was dismissed by the *qazi* for failing to state a claim upon which the *qazi* could grant Ayesha relief, Ayesha and Khalida Auntie sought advice and assistance from two men associated with another non-state Muslim organization in Delhi, the Islamic Fiqh Academy. One of these men wrote out her second (and ultimately successful) divorce request to the Delhi *dar ul qaza*. Additionally, Ayesha’s father accompanied her to meetings with the *qazi* (though, when not giving testimony himself, he was not allowed to sit in the same room as Ayesha).¹²⁴

The behavior of all three of these ‘counselors’—Khalida Auntie, the Islamic Fiqh Academy, and Ayesha’s father—seem more consistent with law as a contest of wits and argument (if not also compassion), rather than threats and deceit. In this way, then, one can see the active participation by these counselors as contributing more to ‘the rule of law’ in this case and in this jurisdiction than would the participation of lawyers.

120. See generally MESSICK, *supra* note 44. See also Erin P. Moore, *Gender, Power, and Legal Pluralism: Rajasthan, India*, 20 AM. ETHNOLOGIST 522, 531 (1993).

121. See Interview with ‘Ayesha,’ *supra* note 47.

122. See *id.* (describing these threats, Ayesha expressed to me: “[T]his is what we got to know through the insider, the person who’s on the board. He gave us, uh, the impression he wouldn’t tell us everything in detail, but that [Zeeshan], I think, through his lawyer, sent a letter to the dar ul qaza saying that, uh, if you were to give the khula without Rehaan’s consent . . . [t]hen, um, you will be in trouble. Something to that effect. Almost like threatening the qazi.”).

123. See *supra* text accompanying note 34.

124. See Interview with ‘Ayesha,’ *supra* note 47.

Indeed, it is far from clear that one should always necessarily attribute representation which is consistent with 'the rule of law' to the state-accredited 'lawyers' seemingly valued by rule of law theorists like Waldron.¹²⁵ While the *dar ul qaza* had no explicit procedural rule forbidding the participation of such lawyers,¹²⁶ it would seem justified in forbidding them if it chose to do so. Conversely, the Indian state court system's facilitation of such lawyers seems problematic from a (dispute-oriented) rule of law perspective.

Fundamentally then, it remains quite an open question as to what role 'lawyers' should continue to play in 'rule of law' theorizing. Examining Ayesha's experience using a Delhi *dar ul qaza*, questions might be raised as well as to the utility of 'non-lawyer lawyers' or 'counseling without counselors.' Certainly, some of the people who helped Ayesha might have been better able to help her if they had known more about the relevant local (Islamic) law.¹²⁷ While there is much more to explore about all of this, for now it is enough to note how yet another phenomenon which liberal rule of law ideology simultaneously under-theorizes and valorizes, while also exclusively associating with state institutions, can be detected in non-state legal venues. However, yet again there remain many questions about the value of this particular procedural manifestation of the rule of law.

CONCLUSION

On the one hand, Oklahoma's recent amendment of its state constitution to ban the use and recognition of "Sharia Law"¹²⁸ by Oklahoma state courts was yet another example of the United States' continuing tone-deafness (or purposeful aversion) to global realities and dynamics. On the other hand, Oklahoma proved to be the most cosmopolitan of states, if cosmopolitanism is understood as being in line with global trends: Oklahoma, like Canada and the United Kingdom before it, was expressing a paranoia of shari'a. In this ironic

125. Strictly speaking, Waldron does not explicitly declare that his "counsel" and "representation" must be state-accredited, but his general orientation towards the state in his discussion suggests as much. *See supra* text accompanying notes 29, 38–41.

126. *See supra* text accompanying note 121.

127. *See supra* text accompanying note 91.

128. *See supra* text accompanying note 4.

convergence of Oklahoma, Ontario,¹²⁹ and other occidentals, there are many lessons to be learned.

Perhaps first and foremost is that there are emerging—and surprising—friendships developing between seemingly disparate spaces and agendas. This Article has been concerned with one such friendship, namely that between American legal nationalism and American legal liberalism. As this Article has also argued, this surprising alliance is largely the result of American legal liberalism's state-centered imagination about 'the rule of law,' the myopic qualities of which have resulted in a neglect of developing intellectual tools that can effectively counter the hyperbolic anti-*shari'a* initiatives that are sprouting all over the American landscape, from Alaska to Arizona, and from Maine to Mississippi.¹³⁰

These initiatives clearly demonstrate the need for alternative, more curious theorizations of what it means for there to be 'law,' and 'the rule of law'—by both American nationalists and American liberals alike. One way of accomplishing this is to ensure that legal ethnography is sutured to legal philosophy and legal theorization. This Article provides several examples of what one might learn via such a suturing. Indeed, American law and legal practice—liberal and otherwise—has much less to fear from Islamic law and legal practice, than it has to learn.

129. See *supra* text accompanying note 6.

130. See *supra* note 21.